No. 06-0695

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

ROBAMA ABED and MARY ABED,

Petitioners,

v.

MARY K. HIGGINS as Independent Executrix of the Estate of J. MARLON HIGGINS, also known as JAMES M. HIGGINS, RUSTY HIGGINS and JAMES MARLON HIGGINS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The State Of Colorado

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Colorado Courts violated the Petitioners' right to a jury trial by allowing a case to be decided by seven jurors instead of six when the Petitioners failed to object contemporaneously to the seventh juror's participation in the deliberations and the rendering of the verdict which constituted a waiver of any error that may have occurred?

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OPINIONS BELOW

The Colorado Court of Appeals affirmed the judgment of the District Court of the City and County of Denver in Case No. 02CV4629 in an unpublished opinion announced on March 30, 2006, holding in part that the Petitioners waived any error that may have occurred in allowing the case to be decided by seven jurors instead of six by failing to contemporaneously object to the seventh juror's participation in deliberations and in the rendering of the verdict. Appendix A to Petition for Writ of Certiorari. The Colorado Court of Appeals denied Petitioners' Petition for Rehearing on June 1, 2006. Appendix B to Petition for Writ of Certiorari. The Colorado Supreme Court denied Petitioner's Petition for Writ of Certiorari on August 28, 2006. Appendix C to Petition for Writ of Certiorari.

JURISDICTION

The United States Supreme Court lacks jurisdiction over this matter because the Colorado Court of Appeals' decision that Petitioners waived any error that may have occurred in allowing the case to be decided by seven jurors instead of six rests on independent and adequate state law grounds over which the Supreme Court lacks jurisdiction.

STATUTES INVOLVED

There are no federal statutes involved in this matter. The Colorado Court of Appeals based its decision on State of Colorado common law.

STATEMENT OF THE CASE

Petitioners Robama Abed and Mary Abed have filed a Writ of Certiorari on the issue of whether the trial court erred in allowing the case to be decided by seven jurors instead of six as provided by statute even though the Petitioners failed to object contemporaneously to the seventh juror's participation in deliberations, and in rendering the verdict.

The trial of this personal injury action arose out of an automobile accident in which the driver of Respondent's vehicle was found negligent by the jury. However, the jury determined that Petitioners, Robama Abed and Mary Abed, did not sustain any injuries or damages caused by the Respondent's negligence. Appendix I of Petition for Writ of Certiorari. The jury therefore determined that because the decedent, Mr. James Higgins, did not cause the Petitioners' injuries, the amount of damages they sustained did not exceed the $2,500 threshold set forth in the former "no fault act," Colorado Sessions Laws 1992, Chapter 220, Section 10-4-714 at 1786-87 in effect at the time of the accident.

The trial court judge impaneled a jury of six and one alternate juror. This was clearly set forth in all the initial proceedings and during voir dire. The Plaintiffs made no objection to the participation of the seventh juror, the alternate juror, in participating in jury deliberations. In fact, the verdict form approved by counsel without objection provided for all seven jurors to deliberate in that there was a signature line for seven jurors. Petitioners' counsel made no objections to the verdict form during the trial. Petitioners failed to preserve this issue by failing to object to the participation of the alternate juror prior to

jury deliberations. Alternate jurors are often allowed to deliberate unless there is an objection by one of the parties. Petitioners clearly waived their right to raise this issue by failing to object at the time.

REASONS THE PETITION SHOULD BE DENIED

I. THE SUPREME COURT LACKS JURISDICTION BECAUSE PETITIONERS WAIVED ANY ERROR THAT MAY HAVE OCCURRED BY FAILING TO OBJECT CONTEMPORANEOUSLY DURING THE TRIAL AS REQUIRED BY THE LAW OF THE STATE OF COLORADO.

Although the Petitioners claim that the Colorado Courts violated their right to a jury trial as guaranteed by the United States Constitution, the Colorado Courts never reached that issue because the Petitioners failed to object contemporaneously at the time of trial to the seventh juror's participation in deliberations and in rendering the verdict. According to Colorado law, the Petitioners waived any error that may have occurred by failing to object. *Gorsich v. Double B Trading Co.*, 893 P.2d 1357, 1364 (Colo. App. 1994). Several Colorado cases have held that issues not presented to or considered by the trial court may not be raised for the first time on appeal. *Pioneer Savings & Trust v. Ben-Showshan*, 826 P.2d 421 (Colo. App. 1992), *First Lutheran Mission v. Department of Revenue*, 613 P.2d 351 (Colo. App. 1980), *Matthews v. Tri-County Water Conservancy Dist.*, 613 P.2d 889 (Colo. 1980), *City of Aurora v. Aurora Firefighters Protective Assoc.*, 566 P.2d 1356 (Colo. 1977).

The Petitioners admit that they failed to preserve or raise the issue at the trial of this matter. The question of whether the Petitioners' failure to object contemporaneously waived any error that may have occurred is a matter of state law and not subject to the jurisdiction of the United States Supreme Court. Colorado Supreme Court decisions are consistent with other State and Federal Courts, and the Supreme Court's decision, that unless an objection is presented to the trial court, the party is precluded from raising the question on appeal, and has waived any error that may have occurred. *Pioneer*, 826 P.2d 421.

It is a longstanding rule that parties must object and bring to the attention of the trial court error in order to raise those questions on appeal. *United States v. Atkinson*, 297 U.S. 157 (1936). See also *Allis v. United States*, 155 U.S. 117, 122 (1894), *Commercial Casualty Insurance Company v. Consolidated Stone Company*, 278 U.S. 177 (1929), *United States v. United States Fidelity & Guaranty Company*, 236 U.S. 512, 529 (1915), *Weast v. County of Pierce*, 116 Fed. Appx. 80, 83 (9th Cir. 2004), *McNeely v. United States*, 353 F.2d 913, 917 (8th Cir. 1965), *Shannon v. Shaffer Oil & Refining Co., et al.*, 51 F.2d 878, 880 (10th Cir. 1931). The Petitioners failed to raise and preserve the issue by objection at the trial. The facts are clear in this case that Petitioners failed to object to the deliberation of the alternate juror in this matter and, as such, have waived their right to assert any error that may have occurred.

Ignoring the general principle of trial law that one must object at trial would essentially give trial counsel a trump card to play at the conclusion of a case if the result is unsatisfactory. This longstanding and fundamental rule

that a party must object and bring to the Court's attention any error that has occurred or is about to occur to preserve that issue for appeal must be upheld.

The Colorado Court's rule that one must object at the trial court level in order to raise the issue on appeal absent specific jurisdictional errors is consistently upheld throughout the State and Federal courts. Because Petitioners failed to preserve the issue, the Supreme Court lacks jurisdiction of this matter.

II. THE ISSUE PRESENTED BY THE PETITIONERS DOES NOT CONCERN A FEDERAL QUESTION, FEDERAL STATUTE OR THE U.S. CONSTITUTION.

As Petitioners concede in the Petition, Amendment VII to the United States Constitution does not apply to State courts. *Pearson v. Yewdall*, 95 U.S. 294 (1877). Furthermore, the question presented does not present an issue concerning a federal statute or an important federal question. As stated previously, the Colorado Court of Appeals based its decision on the fact that the Petitioners failed to preserve their argument by not raising the issue in the trial court. Although this fundamental rule is true throughout the courts of the United States, the Colorado Court of Appeals relied on Colorado common law in reaching their result.

III. THE ISSUE PRESENTED BY PETITIONERS DOES NOT RISE TO THE LEVEL OF AN IMPORTANT NATIONAL QUESTION AND IS NOT OF GENERAL IMPORTANCE.

Even disregarding the fact that Petitioners failed to object in the court below to preserve the issue, the question of whether this case was properly tried before seven jurors instead of six, as provided by the Colorado statute, does not rise to the level of national importance. The Federal Courts have stated that failure to object to a procedural rule regarding the empaneling of a jury does not give one the right to raise that issue on appeal absent the showing of bias or prejudice. *United States v. Dean*, 667 F.2d 729, 733 n.5 (8th Cir. 1982) cited in *Ford v. United States*, 201 F.2d 300, 301 (5th Cir. 1953). The Petitioners in this case have not made any legitimate indication of prejudice or bias on the part of the jury.

Petitioners claim the jury's verdict was a result of passion, prejudice or bias due to their Arabic ancestry. The facts in this case do not support any conclusion of bias or prejudice on behalf of the jury. The only evidence presented at trial that the Petitioners were Arabic came from an emergency room report indicating that Mr. Abed spoke Arabic in the emergency room for treatment that occurred many months after the accident. Petitioners obtained notes from the jury following the trial and alleged that these notes showed jury bias. Clearly the notes did not show bias on their face and, as the Colorado Court of Appeals correctly held, the Colorado Rules of Evidence C.R.E. Rule 606(b) prohibits the trial court's consideration of "juror testimony or affidavits divulging juror

deliberations thought processes, confusion, mistake, intent or other verdict impeaching grounds." *Stewart v. Rice*, 47 P.3d 316, 322 (Colo. 2002). Petitioners' argument of bias consists solely of conclusory statements on behalf of the Petitioners. They have not presented any evidence to support such bias and, therefore, the Colorado Court of Appeals correctly upheld the trial court's discretion in refusing to grant a new trial on the basis of bias or prejudice. *Middleton v. Becket*, 960 P.2d 1213 (Colo. App. 1998).

IV. THE COLORADO COURTS HAVE HELD THAT JURIES IN CIVIL CASES IN COLORADO MAY INCLUDE SEVEN JURORS ALTHOUGH THE STATUTE ONLY REQUIRES SIX.

Although the Colorado statute, C.R.S. §13-71-103 provides for six jurors in civil cases, alternate jurors are allowed and it is proper to allow the alternate juror to deliberate. C.R.S. §13-71-142 provides that the alternate juror may participate in the verdict if provided by law, agreed to by the parties, or ordered by the court.

The Colorado case of *Walford v. Blinder Robinson and Co., Inc.*, 793 P.2d 620 (Colo. App. 1990), found that it was proper for juries to consist of seven persons as opposed to six required by Colorado Statute, C.R.S. §13-71-142. In that case, there was a stipulation that the case be submitted to a jury of seven persons which included the alternate juror. The fact that seven jurors participated in rendering the verdict is not improper and, in fact, is allowed by Colorado law. However, as admitted by Petitioners, they failed to object to the seventh juror deliberating. As set forth in *Walford*, it is proper for the courts to allow the alternate juror to deliberate in Colorado. 793 P.2d 620.

V. PETITIONERS EQUAL PROTECTION CLAIM IS COMPLETELY WITHOUT MERIT.

Petitioners have raised an Equal Protection claim to support their petition. However, Petitioners have failed to provide any evidence that they were treated differently than any other plaintiff. As provided for in C.R.S. §13-71-142 the statute clearly provides that a seventh juror may deliberate in all cases if provided by law, the parties agree, or the court orders. Neither the statute nor its application in this particular case gives rise to an Equal Protection argument. Clearly the Petitioners lack any Equal Protection argument in this case.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, Respondent respectfully requests the Court deny the Petition for Writ of Certiorari.

Dated: December 18, 2006.

Respectfully submitted,

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